SUPREME COURT, U. S.
MAR 21 1974

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONER

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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Petitioner believes that the procedural and substantive tax questions presented in its petition are fairly developed in the petition and brief in opposition. Further argument by petitioner would be inappropriate under the rules of this Court, except for the following brief comment with respect to argument 1c, pages 11-17, of respondent's brief relating to due process of law.

The due process issue is not premature nor does it involve the principal of exhaustion of administrative

remedy. The appeal seeks review of the express holding of the Supreme Court of Appeals of West Virginia that "the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the tax commissioner for the further presentation of evidence on values." The effect of such holding, if allowed to stand, denies to this taxpayer and all other taxpayers involved in State tax controversies due process of law.

The appeal statutes, Code ch. 11, art. 13, sections 7b and 8, require as a condition of the appeal to the Circuit Court that taxpayer first petition the State Tax Commissioner for reassessment of the tax and permits appeal only after the Tax Commissioner enters his administrative decision. The Court below held that the Circuit Court acquired jurisdiction of the case. The administrative prerequisites were satisfied.

Respondent's allegations as to petitioner's failure to present evidence respecting values at the administrative hearing (Brief, pp. 11-13) are outside the record of this case and are incorrect.

As noted in the petition for writ of certiorari, page 9, footnote 4, there is no administrative record in this case. Your petitioner represents, however, that it did in good faith develop its case at the administrative level and did present evidence and arguments as to the value of electric power produced, in part by written statements filed subsequent to the hearing at the request of the taxing authorities. Our complaint in the notice of appeal filed in the Circuit Court (notice of appeal, par. 3(j), R. 6-7) as to the former administrative hearing was that the Tax Commissioner relied upon third party evidence to determine the value of electric power manufactured *which*

evidence was not introduced at the administrative hearing held November 1, 1967. (Emphasis supplied). We stated, however, in our petition filed in this Court, page 15, that the Tax Commissioner can and presumably will correct this procedure upon remand.

Thus, the procedural aspects of the prior administrative hearing are not the issue before this Court. Rather, it is whether the Tax Commissioner's position as adversary prevents him from sitting as the trial judge as to the issue of valuation upon remand. Your petitioner submits that this holding of the Supreme Court of Appeals of West Virginia denies the petitioner due process of law.

Respectfully submitted,

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